APPEAL NO. 93510

In Texas Workers' Compensation Commission Appeal No. 92566, decided December 4, 1992, we determined that the overwhelming weight of the evidence showed that the respondent (claimant herein) sustained some period of disability and reversed the determination of the hearing officer, (hearing officer), that the claimant did not have disability from the date of his work-related knee injury, (date of injury), to the date of the contested case hearing held on August 19, 1992, and we remanded the case for further development of the evidence, as appropriate, and consideration of the evidence not inconsistent with our opinion. On April 27, 1993, a hearing on remand was held in (city), Texas, with (hearing officer) presiding as the hearing officer (the previous hearing officer had resigned from the Texas Workers' Compensation Commission). In his decision on remand, the hearing officer determined that the claimant has had disability from May 1, 1991, through the date of the hearing on remand and ordered the appellant (carrier herein) to pay medical benefits and temporary income benefits (TIBS) in accordance with his decision and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer ordered that TIBS continue until the claimant's disability ends or he reaches maximum medical improvement (MMI).

The carrier disputes the hearing officer's determination on remand that the claimant has had disability and asserts that the hearing officer erred in refusing to allow it to offer additional evidence on abandonment of medical treatment. In addition, the carrier objects to the hearing officer's use of medical texts, disagrees with certain findings of fact and conclusions of law, and requests that we reverse the hearing officer's decision. The claimant requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The primary issue to be determined at the first hearing and at the hearing on remand was: "Is the claimant still suffering disability caused by his on-the-job injury of (date of injury)?" Article 8308-1.03(16) defines "disability" as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

The claimant is a 44-year-old male who does not speak English. An interpreter was used at the hearings. There was no testimony on how the injury occurred. The medical reports reflected that the claimant reported to his health care providers that while he was working on (date of injury), he was crawling on his knees on a cement basement floor when his left knee fell into a crack or hole and he experienced immediate pain in his left knee. The carrier did not dispute that the claimant sustained a compensable injury. The claimant has not worked since the date of his injury. The employer sent the claimant to the (the Clinic) on the day of the accident.

(Dr. G) examined the claimant at the Clinic on (date of injury), diagnosed a contusion of the left knee, and released the claimant to regular work. Dr. G next examined the claimant on May 2, 1991, and took him off work for three days. (Dr. C) examined the claimant at the Clinic on May 27, 1991, and diagnosed a contusion of the left knee, indicated that the claimant could return to light duty work beginning May 8th, and referred the claimant to (Dr. L) an orthopedic surgeon.

Dr. L examined the claimant on May 28, 1991, diagnosed a possible internal derangement of the left knee, took the claimant off work, and scheduled surgery for June 3, 1991, which the claimant cancelled in order to seek another medical opinion. The claimant went to Dr. M) who examined the claimant on June 5, 1991, diagnosed the claimant as having acute tendinitis of the left knee, an internal derangement of the left knee, and a torn meniscus of the left knee. Dr. M referred the claimant to (Dr. B) an orthopedic surgeon, for further evaluation.

Dr. B examined the claimant on June 13, 1991, and stated that he "agreed with the clinical impression of medial meniscal tear and the indication for a diagnostic arthroscopy." On June 28, 1991, Dr. B performed surgery on the claimant's left knee consisting of a partial meniscectomy. On July 9, 1991, Dr. B stated that the claimant was to "continue off work" and referred the claimant for physical therapy.

In a pathology report dated June 29, 1991, (Dr. MC) reported a preliminary diagnosis of shavings from the claimant's left knee as "chronic synovitis with multiple non-caseating granulomas." In a July 1, 1991, addendum to Dr. MC's report, (Dr. CU) reported that his final pathological diagnosis of shavings from the claimant's left knee was the same as the preliminary diagnosis and noted that special stains for acid-fast bacilli and fungus were negative.

In August 1991, Dr. B stated that the claimant's knee was making slower progress than he would like to see, that he was dissatisfied with the claimant's progress, and that instead of improving, the claimant's knee function was deteriorating progressively. Dr. B continued the claimant on physical therapy. In September 1991, Dr. B indicated that the claimant's knee was improving, but in October 1991 said that the knee was not doing much better and referred the claimant to (Dr. GU) an orthopedic surgeon, for further evaluation. Dr. B also stated in an October 1991 report that the claimant was to be off work. In a TWCC-64 Subsequent Medical Report dated October 1, 1991, Dr. B reported to the Commission that the claimant was changing treating doctors and that the new treating doctor would be Dr. GU.

Dr. GU examined the claimant on October 14, 1991, and reported his diagnostic impression as: 1. Torn medial meniscus left; 2. Quad atrophy with extreme weakness left lower extremity; 3. Osteoporosis left knee; and 4. Reflex sympathetic dystrophy left lower

extremity. Dr. GU noted that the pathology report showed chronic synovitis with multiple non-caseating granuloma and stated:

I'm not certain what that means, but normally we think a possible tuberculosis but the pathology report says special stains of acid-fast bacilli and fungus are negative. So again, I'm not certain what that non-caseating granuloma mean.

Dr. GU recommended that the claimant go through extensive rehabilitation treatment to the "quadricep mechanism" before going back to work. Dr. GU also stated that the claimant said that Dr. B told him he was not going to see him any longer and that Dr. GU was going to take his case. Dr. GU noted that he told the claimant that he was only giving a second opinion, that he did not want his case, that he could not take the case unless he had prior approval, and that he could not continue to see the claimant. Dr. GU's report showed that he referred the claimant back to Dr. B because the claimant needed further care.

The claimant testified that he attempted to see Dr. B on two occasions after he saw Dr. GU but was told by someone at Dr. B's office that Dr. B was no longer his doctor and that he should go see Dr. GU. The claimant said that Dr. GU told him he, Dr. GU, was "just a second opinion doctor" and would not see him after the examination of October 14th. The claimant said that he just wanted to know which of the two, Dr. B or Dr. GU, was going to be his doctor, and that neither one wanted to be his doctor. He said that when he called the carrier he was told that he could not see any more doctors because he had "changed already too many doctors."

On January 16, 1992, the claimant was examined by (Dr. R) an orthopedic surgeon. According to the carrier, the examination was done at its request pursuant to a medical examination order. Dr. R reported that he thought the claimant's primary problem at the time of the examination was left quadriceps muscle weakness without an intrinsic abnormality of the knee, and recommended that the claimant engage in vigorous active exercise. He also reported that the claimant could return to work in a limited capacity with restrictions on climbing since the claimant's knee could give way.

There was evidence that the claimant attempted to see Dr. GU on April 30, 1992, but was not seen "due to approval," and that he made a subsequent attempt to see Dr. GU which was also unsuccessful. The claimant then went to (Dr. S) a chiropractor, who, in reports dated May 22 and 28, 1992, diagnosed the claimant as having an internal derangement of the left knee and recommended that the claimant be excused from work until further notice in order to avoid aggravating his condition. By letter dated June 8, 1992, the carrier objected to the claimant's treatment with Dr. S. The claimant testified that Dr. S told him that the carrier refused to pay for treatment with him.

In a letter dated August 4, 1992, Dr. B referred to the preliminary diagnosis in Dr. MC's pathology report--chronic synovitis with non-caseating granulomas--and stated that "this is a condition that is absolutely not related to any traumatic episode."

The claimant testified that since his operation his knee swells up every day and "cracks" and that he can not "step fully" because his knee hurts. He also said that his knee "bends sideways." He also testified that he had asked his employer if the employer would take him back with some limitations on his work and that the employer told him it would not "guarantee me employment." The claimant further testified that he has not looked for a job because he has too many "limitations" on the type of work he can do and no one would want him with his limitations.

In the Decision and Order following the first hearing held on August 19, 1992, the hearing officer determined that the claimant did not have disability from the date of his work-related injury to the date of the hearing. The claimant appealed that decision and we held in Appeal No. 92566 that the overwhelming weight of the evidence showed that the claimant sustained some period of disability. In reversing and remanding the case for further development of the evidence, as appropriate, and consideration of the evidence not inconsistent with our opinion, we stated:

> [Dr. B's] opinion that the pathology diagnosis of "chronic synovitis with multiple non-caseating granulomas" is a condition that is absolutely not related to any traumatic episode, does not shed any light on what the described condition is, how it relates to the diagnoses of internal derangement of the knee and a torn meniscus for which surgery was performed, or how the condition is in any way related to the claimant's inability to obtain and retain employment. These matter should be developed on remand. Without such evidence, we cannot comprehend how the hearing officer could use [Dr. B's] opinion as to the pathology diagnosis as a basis for finding no disability from the date of injury as urged by the carrier in its response.

On remand, the carrier urged that the diagnosis of chronic synovitis with multiple non-caseating granulomas was not related to the claimant's injury of (date of injury), and that it was this condition, and not the claimant's injury of (date of injury), which prevented the claimant from working after October 1991. At the hearing on remand the carrier introduced into evidence a letter from Dr. B dated February 16, 1993, in which Dr. B stated that he felt that the claimant reached "maximum benefit from treatment" on October 1, 1991; that the claimant is entitled to a five percent partial loss of function to his left knee; and that "most probably his [the claimant's] complaints of pain to the left knee after he reached maximum benefit from treat (sic), are related to chronic synovitis with multiple non-caseating granulomas." In an addendum to his letter, Dr. B stated that "chronic synovitis with multiple

non-caseating granulomas is an inflammatory reaction of the soft tissue, caused by certain infectious processes such as tuberculosis." He also added that the five percent loss of function to the left knee is equal to two percent "whole body." Attached to Dr. B's letter is an undated Report of Medical Evaluation (TWCC-69) in which Dr. B certifies that the claimant reached MMI on October 1, 1991, with a two percent whole body impairment rating. At the hearing on remand, the carrier requested that the hearing officer add an issue concerning MMI; however, the hearing officer correctly determined that MMI was not an issue raised at the BRC, that the only issue before him was disability, and refused the carrier's request. *See* Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992, where we determined that it was error for the hearing officer to make a determination as to MMI when disability was the only issue at the BRC. In closing argument the claimant said that "for the record" he wanted it known that he disagreed with Dr. B's report.

At the hearing on remand the hearing officer took official notice of pages 1367 and 1368 (section discussing tendinitis and tenosynovitis) of the (Merck Research Laboratories 1992) and admitted those pages into evidence as a hearing officer exhibit. He also took official notice of pages 84-87 (sections discussing chronic granulomatous inflammation and systematic effects of inflammation) of Robbins and Cotran, Pathologic Basis of Disease, Second Edition (W.B. Saunders Company 1979) and admitted those pages into evidence as a hearing officer exhibit. The hearing officer advised the parties that they could object to his taking official notice of the referenced portions of the medical texts and in his admitting those pages into evidence. Neither the carrier nor the claimant made any objection to the hearing officer's action at the hearing. Consequently, we find no merit in the carrier's contention on appeal that the hearing officer erred in taking official notice of the pages from the medical texts. *See* Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.) where the court held that evidence which is admitted without objection cannot be complained of on appeal.

We also do not find merit in the carrier's assertion that the hearing officer erred in refusing to allow it to offer additional evidence on abandonment of medical treatment at the hearing on remand. At the first hearing the carrier asserted, among other things, that the claimant did not have disability because he had not had medical treatment for a period of some six months. In the hearing officer's decision following the first hearing, the hearing officer found that the claimant had abandoned treatment for his knee injury in arriving at his conclusion that the claimant did not have disability since the date of his injury. In Appeal No. 92566, we noted the confusion that had existed between Drs. B and GU as to which of them was to be the claimant's treating doctor and their refusal to see the claimant, and we held that the evidence did not support a finding of abandonment of treatment. We also pointed out certain deficiencies in a finding of fact which purportedly supported the determination of abandonment and held that the finding did not support that determination. In remanding the case to the hearing officer, we did not request any further development of

evidence on the matter of abandonment of treatment; rather, we only requested that evidence be developed on the diagnosis of chronic synovitis with multiple non-caseating granulomas as that diagnosis related to the issue of disability. The hearing officer on remand recognized the limited purpose for the remand in determining that abandonment of medical treatment was not an issue on remand. We would also point out that the carrier did not attempt to offer any "additional evidence on abandonment of medical treatment" at the hearing on remand and that all documentary evidence offered by the carrier was admitted into evidence at that hearing. We also point out that on appeal the carrier does not indicate what, if any, additional evidence on that matter it wanted to offer.

At the hearing on remand, the carrier urged the hearing officer to find that the diagnosis of chronic synovitis with multiple non-caseating granulomas is not related to the claimant's knee injury of (date of injury). On appeal, the carrier disputes the following finding and conclusion:

FINDING OF FACT

No. 10. Non-caseating granulomas are a physiological response to soft tissue injury such as inflammation of the synovium.

CONCLUSION OF LAW

No. 3. There is insufficient medical evidence to conclude that the pathological diagnosis of chronic synovitis with multiple "non-caseating granulomas" is related to the claimant's condition.

We interpret the use of the word "condition" in Conclusion of Law No. 3 to mean the claimant's work-related injury. Our interpretation is based on the fact that one of the reasons we remanded the case was for further development of evidence on how the diagnosis of chronic synovitis with multiple non-caseating granulomas related to the diagnoses of internal derangement of the knee and a torn meniscus, and on the fact that the hearing officer made a separate conclusion of law on the question of whether the claimant's pathological diagnosis related to his inability to obtain and retain employment. The carrier's dispute over the referenced finding and conclusion centers on its belief that the hearing officer resorted to the information in the medical texts that were officially noticed in arriving at the disputed finding and conclusion instead of relying solely on Dr. B's opinion. We find no merit in the carrier's dispute of Finding of Fact No. 10 and Conclusion of Law No. 3 because, in essence, the hearing officer determined that the pathological diagnosis is not related to the claimant's work-related injury, which is exactly what the carrier urged at the hearing. Furthermore, the hearing officer was free to resort to the use of the information in the medical texts which he took official notice of and admitted as exhibits without objection.

The carrier also disputes Finding of Fact No. 9 that the claimant had inflammation of the tendon in and around the bursa sac of his left knee resulting from his work-related injury on (date of injury). The evidence showed that Dr. M had diagnosed the claimant as having acute tendinitis of the left knee, along with an internal derangement and torn meniscus of the left knee. The section on tendinitis in the Merck Manual which the hearing officer put into the record as a hearing officer exhibit without objection, describes tendinitis as an inflammation of a tendon, states that the etiology is often unknown, but also states that repeated or extreme trauma (short of rupture), strain, or excessive (unaccustomed) exercise is most frequently causative. This excerpt from the Merck Manual also states that bursae are often located near tendons. Given the description of how the claimant was injured (left knee fell through a crack or hole while crawling), a diagnosis of tendinitis (inflammation of a tendon), and the evidence from the medical text that tendinitis can be caused by extreme trauma or strain, we hold that the hearing officer's finding that the claimant had inflammation of the tendon of his left knee resulting from his work-related injury to be sufficiently supported by the evidence and not against the great weight and preponderance of the evidence.

The carrier also disputes Conclusion of Law No. 4 which states: "There is insufficient medical evidence to conclude that the condition of "chronic synovitis of (sic) multiple non-caseating granulomas" is related to the claimant's inability to obtain or retain employment." While we are aware that Dr. B opined to the effect that most probably the claimant's complaints of pain to the left knee after October 1991 are related to chronic synovitis with multiple non-caseating granulomas, which diagnosis was determined by the hearing officer not to be related to the claimant's work-related injury, we also take note that Dr. GU stated to the effect that he was not certain as to what the pathological diagnosis meant and he diagnosed, among other things, reflex sympathetic dystrophy to the left lower extremity and did not make any mention of that condition being related to the pathological diagnosis of which he was aware. In addition, several months later Dr. S diagnosed the claimant's condition as an internal derangement of the left knee when he took the claimant off work, which was the same diagnosis as Dr. L had given in May 1991.

The question of whether the pathological diagnosis of chronic synovitis caused the claimant to be unable to work was a factual determination to be made by the hearing officer. He found the evidence insufficient to establish a causal connection. Under the 1989 Act, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). It has been held that the opinion evidence of expert medical witnesses is but evidentiary, and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer's decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. *See* Appeal No. 92064, *supra*. Having reviewed the record, we cannot conclude that the hearing officer's Conclusion of Law No. 4 is so against the great weight and preponderance

of the evidence as to be clearly wrong and manifestly unjust. *See* Pegues, *supra*, where the court held that the jury was not required to accept the claimant's doctor's testimony that, in his opinion, the claimant's disability was caused by a malignant bone tumor and that a jury finding that disability sustained by the claimant was not caused solely by the tumor, independent of and not aggravated by the injury, was not against the great weight and preponderance of the evidence.

The carrier also disagrees with the hearing officer's conclusion that the claimant has had disability since May 1, 1991, through the date of the hearing, to the extent that disability is found after October 1, 1991. The carrier urges that the evidence shows that the claimant's inability to work after October 1, 1991, was the result of a condition not related to the claimant's work-related injury. The question of whether the claimant's inability to obtain and retain employment at preinjury wages was because of his compensable injury was a factual determination for the hearing officer to make based on all the evidence. It is undisputed that the claimant had an accident at work which required knee surgery and that in addition to being diagnosed as having a torn meniscus and internal derangement of the left knee, he was also diagnosed as having tendinitis of the left knee. The evidence showed that tendinitis can be caused by trauma. Several doctors only returned the claimant to limited work and Dr. S took the claimant off work completely. The claimant testified that his knee swells, cracks, and bends sideways. Although Dr. B attributes the claimant's pain after October 1991 to the pathological diagnosis, the hearing officer, as the trier of fact, was not bound by that opinion and could consider it in relation to other medical evidence along with the claimant's testimony in determining the existence of disability as defined by the 1989 Act. Having reviewed the record, we conclude that the hearing officer's determination that the claimant has had disability since May 1, 1991, to be sufficiently supported by the evidence and further conclude that such determination is not against the great weight and preponderance of the evidence.

Although we affirm the hearing officer's decision that the claimant has had disability since May 1, 1991, we point out, as did the hearing officer in his decision, that TIBS continue until the claimant's disability ends or he reaches MMI. *See* Article 8308-4.23(a) and (b). MMI is defined as the earlier of: (a) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (b) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). MMI was not an issue in this case, thus the hearing officer did not make a determination on whether or when the claimant reached MMI. Since the claimant's TIBS began to accrue on May 1, 1991, he would be statutorily determined to have reached MMI on April 30, 1993, unless the claimant is determined to have reached MMI on an earlier date in further proceedings under the 1989 Act, or by agreement, or under other provisions of the 1989 Act and Commission Rules.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge